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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 292

PRIMROSE SUPER MARKET OF SALEM, INC.,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Primrose Super Market of Salem, Inc., prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the First Circuit, entered on April 7, 1965, affirming and enforcing the order of the National Labor Relations Board issued against petitioner August 28, 1964.

Opinions Below

The Circuit Court of Appeals filed no opinion. The Decision and Order of the National Labor Relations Board (R. 1) [1] are reported at 148 NLRB No. 66.

[1] References to the Record Appendices of Petitioner and Respondent filed in the Court of Appeals are designated by "R"; references to the Board's Supplemental Appendix are designated by "S.A."

Jurisdiction

The decree of the Circuit Court of Appeals was entered April 7, 1965 (Appendix A infra. P. 18). Upon Petitioner's Motion to Stay Enforcement of Decree filed April 21, 1965, the Circuit Court of Appeals on April 21, 1965 stayed its decree pending the filing and disposition of a petition for a writ of certiorari. The jurisdiction of this Court is invoked under Section 10(e) of the National Labor Relations Act. (61 Stat 147-48; 29 U.S.C. § 160(e))

Questions Presented

1. Whether the Board's determination that a collective bargaining unit confined to the employees of Petitioner's Salem, Massachusetts store was not based upon substantial evidence in the record taken as a whole.

2. Whether the Board's Order was an unreasonable exercise of the Board's discretion and was therefore arbitrary and capricious.

3. Whether the Board's determination that a collective bargaining unit confined to the employees of Petitioner's Salem, Massachusetts store was contrary to the law in that the extent of organization was controlling in the Board's determination.

4. Whether the Board's findings in regard to the credibility of witnesses were made in conformance with Sections 10(c) and 10(e) of the National Labor Relations Act and Section 8(b) of the Administrative Procedure Act.

Statutes Involved

The pertinent provisions of the National Labor Relations Act (61 Stat 136, 73 Stat. 519, 29 U.S.C. § 151-168) and the Administrative Procedure Act (60 Stat 237, as amended;

5 U.S.C. § 1001-1011) are set forth in Appendix, infra. pp. 19-21.

Statement of the Case

On August 9, 1963, Local 1435, Retail Clerks, International Association, AFL-CIO, sent a telegram to George Karambeles, the General Manager and Treasurer of petitioner stating that it had started organizing "your stores." (R. 137, 185) At about the same time, Union representatives were engaged in organizing activities at petitioner's Salem, Massachusetts store and the Peabody and Haverhill stores, both of which are separate corporate entities. (R. 136-137, 155) [2]

At a meeting on August 13, 1963 between representatives of petitioner and the Union, petitioner refused to recognize the Union as bargaining representative of the employees at its Salem store, as requested by the Union, on the ground that the appropriate bargaining unit consisted of the employees of all five Primrose stores. (R. 42-44)

Following a charge and an amendment thereto by Local 1435, Retail Clerks International Association, AFL-CIO, the Board's General Counsel issued a complaint on November 8, 1963. (R. 3) Petitioner duly filed its answer, hearings were held and the Trial Examiner issued his Decision and Recommended Order on May 13, 1964. (R. 3-23) Exceptions were filed by petitioner (R. 195-208) and on August 28, 1964 the Board issued its Decision and Order

[2] The Union had previously filed an election petition with the National Labor Relations Board on July 13, 1960, requesting a unit of all employees in the Primrose stores located in Georgetown, Haverhill, Peabody and Salem, all in Massachusetts (the Newburyport, Massachusetts store did not then exist), and excluding store managers, office employees, supervisors and guards. The companies agreed that the employees in the then-existing stores constituted an appropriate unit and an election was conducted by the Board. The Union failed to obtain a majority of the votes cast. (R. 45, 138)

(R. 1-2) and filed a petition for enforcement of this order with the United States Court of Appeals for the First Circuit. (R. 131-132)

The complaint alleged and the Board found that petitioner had violated sections 8(a)(5) and (1) of the National Labor Relations Act (Appendix B, infra, p. 19) by refusing to bargain collectively with the Union which represented a majority of its employees in an appropriate bargaining unit.[3] In addition, the Board found petitioner to have violated section 8(a)(1) of the Act by coercively interrogating its employees, by threatening them with reprisals if they adhered to the Union, by creating the impression of surveillance, and by soliciting withdrawals from the Union.

Petitioner is a discount supermarket in Salem, Massachusetts, all the stock of which is owned by George Karambeles and his brother, Arthur Karambeles. (R. 9-11) The two brothers also operate four other discount supermarkets, each a separate corporation, which are located in Peabody, Haverhill, Georgetown and Newburyport, all within Essex County, Massachusetts. (R. 10) Four other corporations owned by the brothers perform management and office functions, including payroll, provide trucking sources for all the stores, lease facilities to the individual stores (except in Peabody), and handle the advertising for all the stores. (R. 10, 82-83) The officers and directors of all nine corporations are the same. (R. 11)

The distances between the Salem store, involved in this proceeding, and the other four stores range from four to five miles to the Peabody store, Peabody and Salem being contiguous cities, to 28 miles to the Haverhill store. Also located in Haverhill is the central office which handles all of the nine corporations' bookkeeping functions including

[3] The parties stipulated at the hearing that when the Union requested recognition, a majority of the employees of petitioner's Salem store had designated the Union as their bargaining representative. (R. 27-28)

payroll, accounting, billing and maintains centralized personnel records. (R. 10-11)

The labor relations policy is the same for all stores, and includes the same wage policies, wage rates, holidays, vacations, health and welfare, and other benefits and working conditions. All of the stores have the same payroll week. The Salem and Peabody stores are open Monday and Tuesday evenings, otherwise the hours are the same for all the stores. (R. 11, 108-09)

The management of all nine corporations is directly supervised by George Karambeles, the General Manager. Immediately under him are three supervisors, meat, grocery and produce, all of whom are based at the central office in Haverhill. (R. 11) The general manager and the supervisors have over-all responsibility for the operations of the five stores. (R. 11, 76) George Karambeles makes the final decision on hiring, discharging, transferring and promoting employees (R. 84); he authorizes all wage increases (R. 86); he checks on the work progress of the employees (R. 76); he reviews with the three supervisors the net and gross return and volume of business and, for example, where a decrease in volume of business has occurred, discusses the matter with the appropriate supervisor and store department manager in the store involved. (R. 12) The general manager determines, after consultation with the three supervisors and each store manager, the number of personnel required for each store, (R. 12) and approves all layoffs and recalls. (R. 62) Several times a week the general manager visits each store. (R. 12)

The meat, grocery and produce supervisors are in charge of the respective departments in all of the stores. (R. 11-12) Each supervisor does the purchasing except emergency fill-in or shortages, prepares the advertising, determines retail prices, interviews and recommends applicants for full-time and part-time jobs, recommends transfers (both

temporary and permanent) between the stores, determines the sales plans, visits each store several times a week and checks the appropriate volume of merchandise, determines if ordering has been done properly, and retail price charges have been made correctly. (R. 11, 12, 76, 79) He reviews with the general manager wage increases for the employees. (R. 12) He consults with the general manager and the store manager on the number of personnel in the store's department, the granting of wage increases, and the promotion of assistant department heads. (R. 12, 86-87) These duties are the same for the three supervisors, except the grocery supervisor who is also in charge of all store operations. (R. 12, 92)

Each store has a store manager who handles the store's day-to-day operations. (R. 14, 76) His daily duties consist of opening the store, opening the safe and setting up the cash registers, checking with the department heads on their merchandise, sales plans and sales items, (R. 14, 65) ordering small quantities of merchandise when there is a shortage, (R. 79-80, 98) recommending the hiring and firing of employees, (R. 65) and recommending wage increases and promotions. (R. 98) Any action by the store manager in regard to the layoff and recall of employees is subject to the final approval of George Karambeles, the general manager of all the stores. (R. 61-62) The authority to discharge employees rests exclusively in the general manager. (R. 65, 84) The hiring of full-time and part-time employees is done by the store manager only after consultation with the general manager. (R. 67, 84) As to individual employee wage increases, the general manager makes the final decision with the approval of the supervisor of the department involved and after consultation with the store manager. Other duties of the store manager are to make out weekly work schedules, assign employee break periods, handle customer complaints, maintain the store's master

price book, and compute each employee's hours of work for payroll purposes. (R. 14-15) The store manager is also responsible for displays of merchandise and is required to check with the department heads of the store to see that they have enough merchandise on hand and if they know their sales plans and sales items. The store manager is consulted about sales plans and advertising but only after the plans and advertising programs have been devised. (R. 157, 162) The store manager has limited authority over the meat department. (R. 144, 147) He is in constant communication with either the general manager or the supervisors. (R. 147) The store manager does not determine the number of employees needed in his store. (R. 158, 175) The grocery supervisor and the general manager determine how a store is to be run. (R. 161)

The advertising format is the same for all five stores. The Salem and Peabody stores advertise jointly in the Salem News. Flyers and handbills which are distributed every two weeks, contain the names and addresses of all the stores, each store being given equal mention. (R. 11, 163) The same merchandise is sold and the same prices are charged in all the stores. Special sales are held at the same time in all the stores. Sales plans determined by the meat, grocery and produce supervisors are the same for all five stores. (R. 11) Although this is no single central warehouse (R. 88), frozen foods are stored at the Salem store and transferred to the other stores as required, meats are delivered to the Peabody store and from there sent to the other stores, and some groceries are warehoused at the Peabody and Haverhill stores. (R. 11, 78)

Employees are temporarily transferred between the stores because of vacations, absenteeism, sickness, fluctuation in business, the desire to increase profits of a particular department or store, employees quitting their employment, promotions, and due to personality clashes. (R.

181-83, 179) There are also permanent transfers between stores. (R. 160) During 1962, the Salem store employed an average of between 12 and 15 employees, excluding the store manager. (R. 193) For that year, there were 13 transfers involving nine different employees between the Salem store and the four other stores. (S.A. 33-34) Only one of these transfers was permanent. For all the stores in 1962 the average number of employees totaled between 89 and 97. (R. 193) Sixty-six transfers occurred involving 23 different employees among all five stores. (S.A. 33-34)

During 1963, the average number of employees at petitioner's Salem store was between 28 and 29. (R. 193) There were 62 transfers involving 36 different employees between the Salem store and the four other stores. (S.A. 34-36; R. 34, 35, 38, 49; 52-53, 57, 58-59, 135) The average number of employees in all the stores was between 124 and 132. (R. 193) For the year there were 140 transfers involving 66 different employees among all five stores. (S.A. 34-36) Some of the transfers in 1963 were due to the changeover of all five stores from regular retail operations to discount supermarkets which occurred between April and August. (R. 10) The changeover process took two or three days during which time the store undergoing such alterations was closed and no transfers due to the changeovers were made after the first week of operation as a discount store. (R. 57, 107-108; S.A. 34-36) Eliminating all the transfers to each store during 1963 which took place within three days prior to and one week after its changeover to discount operations, there were 88 transfers involving 49 employees which were due to other reasons. (R. 53, 57, 59, 108; S.A. 34-36)

The Salem store became a discount operation on May 22, 1963. If all transfers to the Salem store between May 19 and May 29, 1963 and all transfers from the Salem store

during the corresponding eleven days surrounding the changeover of the Georgetown, Haverhill, Newburyport and Peabody stores respectively are eliminated, there remain 27 transfers to and from the Salem store in 1963 involving 19 employees, all of which transfers were made for reasons other than the conversion to discount operations. These transfers were compulsory; that is, not voluntary on the part of the employee, and employees are advised upon hiring that they are subject to transfer to other stores. (R. 180) In addition to the transfers, two employees of the Salem store, both of whom would be included in the unit requested by the Union, regularly work part of each week in the Peabody store. (R. 164-167)

A substantial amount of merchandise is transferred between the stores. (R. 158-159, 170) In 1963, the Salem store paid the other four stores for groceries, meats, produce and store supplies shipped to it a total of $38,177.02. The corresponding figure for 1962 is $14,757.34, and for December, 1961, $3,114.06 was paid. (R. 187-192)

There was testimony by witnesses for the Board's General Counsel that petitioner had engaged in threats, interrogation, and conduct creating the impression of surveillance by petitioner as well as solicitation accompanied by threats by petitioner that employees withdraw from the Union. (R. 30, 35, 36, 41) Petitioner's representatives denied participation in any such action. (R. 100-101, 171-172, 173, 174, 175, 176)

The Board concluded that a bargaining unit consisting of the Salem store employees was appropriate and that petitioner had violated Section 8(a)(5) of the Act by refusing to bargain collectively with the Union as the representative of the Salem employees. In addition, the Board found that petitioner had violated section 8(a)(1) by reason of interference, restraint and coercion.

Reasons for Granting the Writ

1. Basically, the issue here presented is similar to that recently before this Court in *National Labor Relations Board* v. *Metropolitan Life Insurance Company,* 380 U.S. 438 (1965). Under Section 9(b) of the National Labor Relations Act, the Board is delegated broad authority "in order to assure the employees the fullest freedom in exercising the rights guaranteed by this sub-chapter" to decide the appropriate bargaining unit. This broad discretion will be rarely disturbed. *Packard Motor Car Co.* v. *NLRB,* 330 U.S. 485, 491 (1947). Unit determinations, however, may not be arbitrary or capricious. *NLRB* v. *Deutsch,* 265 F. 2d 473 (9th Cir. 1959), cert. denied 361 U.S. 963, rehearing denied 362 U.S. 945; *Metropolitan Life Insurance Co.* v. *NLRB,* 330 F. 2d 62 (6th Cir. 1964); *Marlin-Rockwell Corporation* v. *NLRB,* 116 F. 2d 586 (D.C. Cir. 1941), cert. denied 313 U.S. 594.

Likewise the Board must articulate the reasons for its determinations. *National Labor Relations Board* v. *Metropolitan Life Insurance Company,* 380 U.S. 438 (1965).

Here the Board, basing its determination on "traditional" unit criteria, employed the following factors in reaching its conclusion that the single store unit was appropriate: (1) geographical separation of the five Primrose stores; (2) separate corporate status of each store; (3) autonomy of the Salem store; (4) minimal interchange of employees among the stores; (5) extent of union organization; and (6) absence of bargaining history. Under such "long-established" criteria, a single-plant unit is presumptively appropriate unless it is established that it has been so effectively merged into a more comprehensive unit so as to have lost its individual identity. *Frisch's Big Boy Ill-Mar, Inc.,* 147 NLRB No. 61; 29 NLRB An. Rep. 50 (1964).

Petitioner has no quarrel with the Board's use of the particular criteria in this case. But petitioner believes the Board, in basing its decision on findings which are unsupported by substantial evidence on the record considered as a whole, has misapplied the chosen criteria. Thus, judicial examination and reversal are proper. *NLRB* v. *Brown*, 380 U.S. 278, 290-292 (1965); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963). The Board here has not demonstrated that it has properly exercised the discretion with which Congress empowered it. *Phelps Dodge Corp.* v. *NLRB* 313 U.S. 177 (1941) Once the Board has chosen the criteria by which it will be guided in its determination of a bargaining unit in accordance with its mandate under section 9(b), "its findings must be supported by substantial evidence and its explanation must fit the case before it, be adequate, and be based upon the policy of the Act and an acceptable reading of industrial realities." *American Shipbuilding Company* v. *NLRB*, 380 U.S. 300, 326 (Concurring opinion, White, J.).

Taken as a whole, the Board employs the criteria to enable it to determine whether a petitioned-for bargaining unit comprises a homogeneous group of employees with sufficient mutual interests in order to assure employees their rights under the Act. *Continental Baking Co.*, 99 NLRB 777, *Texas Instruments, Inc.* 145 NLRB No. 30. For example, the general rule has been stated: "The appropriateness of a bargaining unit is primarily determined on the basis of the common employment interests of the group involved." 26 NLRB An. Rep. 55 (1961). To permit a union to carve out a portion of an identifiable and distinct homogeneous group is contrary to the Congressional mandate contained in Section 7. (61 Stat. 140; 29 U.S.C. § 157; Appendix B, infra, P. 19)

In terms of the Act, the separate corporate status of each store has no significance in this proceeding. In its Brief

to the Court of Appeals, the Board acknowledged that a five-store unit might be appropriate because of the integration of top management personnel and the common ownership and over-all control of all the stores. The Board frequently declares such multi-employer units appropriate where, as here, the companies are engaged in the same activity, the interests of the employees are identical, and there is a common labor relations policy among the separate corporate entities. *NLRB* v. *Stowe Spinning Co.* 336 U.S. 226, 227 (1949); *NLRB* v. *Somerset Classics, Inc.*, 193 F. 2d 613, 615 (2d. Cir. 1952), *cert. denied*, 344 U.S. 816; *NLRB* v. *Condenser Corporation*, 128 F. 2d 67, 71-72 (3rd Cir. 1942). In short, vis-a-vis the employees this factor is of no significance in limiting the unit to the Salem store.

As for the element of extent of organization, this Court has recently affirmed that it may be employed as one appropriate factor. *NLRB* v. *Metropolitan Insurance Company*, 380 U.S. 438, 441-442. However, the Board discounted the fact that three years prior to the request for recognition involved in this case the Union petitioned the Board for an election in a unit comprising the employees of all the then-existing stores. The Union lost the consent election. Also, while organizing the Salem store, the Union was engaged in organizational activity at the Peabody and Haverhill stores, and in its first communication sent to the stores' general manager at their main office, the Union declared it had "started organizing your stores." Thus, while it is true that the Union's position as the charging party in this case is that the Salem store is the appropriate unit, the Board has considered relevant previous election petitions. See, e.g., *Hot Shoppes, Inc.*, 130 NLRB 144, 146-147. Extent of organization may be an appropriate factor in supporting a broader unit where two unions are involved in a representation proceeding, one of which is seeking a broader unit than the other. But, absent the establishment

of the homogeneity of a particular group of employees by the use of other criteria, reliance on extent of organization cannot be employed by the Board in determining the appropriate unit. It appears here to petitioner just as it did to the First Circuit in *Metropolitan Life Insurance Company* v. *NLRB*, 327 F. 2d 906, *vacated and remanded*, 380 U.S. 438 (1965), that the Union's policy is to obtain recognition for whatever unit it thinks it can win in an election. The Union was unable to organize successfully the Peabody and Haverhill employees, so it limited its request for bargaining to the Salem store.

In relying on the absence of past bargaining history on a broader basis than the Union sought here, the Board has misapplied a factor usually used where the unit sought is different from that in which past bargaining has actually occurred. It does not follow that a *lack* of bargaining history may be reasonably used where other "traditional" criteria point to another particularly appropriate unit. Previous bargaining history is nothing more than evidence of a natural grouping. *International Association of Tool Craftsmen* v. *Leedom*, 276 F. 2d 514 (D.C. Cir. 1960); *Metropolitan Life Insurance Company* v. *NLRB*, 328 F. 2d 820, (3rd Cir. 1964), *rev'd*, 380 U.S. (1965). Lack of previous bargaining in a broader unit does not support a conclusion of the appropriateness of the single-store unit; it supports no conclusion in favor of any unit.

The Board found that the Salem store is independent from the other stores. This was based on erroneous findings as to the functions and responsibilities of the store manager. To state, as the Trial Examiner did, that the Salem store manager is responsible for the day-to-day operations of the store does not establish the autonomy of the store. *C. Pappas Company, Inc.*, 80 NLRB 1272, 1273. There is substantial evidence that the final decision on layoff and recall of employees was made by the general

manager of all the stores. All the evidence points to the fact that the general manager had exclusive authority to discharge employees. The final decision on all hires, transfers and promotions was that of the general manager. The store manager's authority in these matters was limited to making recommendations. Most of the store manager's duties were of a housekeeping nature. As the evidence clearly shows, the store manager was limited by the authority of the general manager and the meat, produce and grocery managers.

It is readily apparent, and the evidence so demonstrates, that the five stores are run as an integrated unit. The Board has often relied on the centralization of management and functional integration of operations to establish multi-store bargaining units. *Overton Markets, Inc.*, 142 NLRB 615; *Spartan Department Stores*, 140 NLRB 608, 610-611; *Weis Markets, Inc.*, 142 NLRB 708, 709-710; *Meijer Supermarkets, Inc.*, 142 NLRB 513, 515-516. The Board has also cited the transfer of merchandise, an important factor in this case. *Mary Carter Paint Co.*, 148 NLRB No. 6 (1964).

The most critical error made by the Board was its characterization of the interchange of employees between the stores as "minimal." As stated above, even discounting, as nonrecurring, those transfers due to the changeover to discount operations, there still remain substantial transfers involving the Salem store. These transfers were continual and were compulsory. They clearly demonstate that the employees of all the stores constitute a homogeneous group. See, e.g., *Spartan Department Stores*, 140 NLRB 608; *Hot Shoppes, Inc.*, 130 NLRB 144; *Haliburton Co.*, 142 NLRB 644; *Stewart & Co.*, 139 NLRB 342; *North American Aviation, Inc.*, 127 NLRB 356; *Hamilton Bros. Inc.*, 133 NLRB 868.

The Board also relied on the factor of geographical separation. Generally a physical separation of employees in-

dicates a lack of mutual interest. Here, however, the reliance on geography is misplaced because of frequent interchange of employees. This is particularly true of the Salem and Peabody stores, located in contiguous cities and with numerous interchanges between them. *Hot Shoppes, Inc.*, 130 NLRB 144 (1961); *S. G. Tilden, Inc.*, 129 NLRB 1096; *Hot Shoppes, Inc.*, 130 NLRB 138, 144 (Dissent); *C. Pappas Company, Inc.*, 80 NLRB 1272, 1273.

The Board, in misapplying in this case the criteria for the unit determination which it selected to use, has failed to follow the statutory requirement that its findings be supported by substantial evidence on the record considered as a whole. This is not a case simply where some of the factors tend to support a broader unit. See *Mueller Brass Co.* v. *NLRB*, 180 F. 2d 402, 405 (D. C. Dir. 1950); it is a case where the Board chose a completely inappropriate unit based on the evidence in the record. The Court's power of suspension is thus necessary to correct an arbitrary and capricious determination of the Board.

2. The Board and the Court of Appeals in determining that the appropriate bargaining unit was limited to the employees of petitioner's Salem store have violated the mandate of Section 9(c)(5) of the Act as recently construed by this Court in *NLRB* v. *Metropolitan Life Insurance Company*, 380 U.S. 438 (1965). As demonstrated above, the Board's reliance on the factors of corporate status, autonomy, minimal interchange, absence of bargaining history, and geographical separation was erroneous. It must follow that the remaining factor of extent of organization was controlling. This the Board may not do. *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965).

3. In resolving the issue of credibility in testimony given on petitioner's alleged 8(a)(1) violations of the Act, the Trial Examiner, as the trier of fact, failed to set forth his reasons therefor. His findings based on his "observation

of the witnesses" (R. 3) do not comport to the substantial evidence on the whole record test required under section 10(e) of the Act (61 Stat. 147-148; 29 U.S.C. § 160(e) Appendix B, infra. p. 20), or the preponderance of testimony requirement of section 10(c) (61 Stat. 147; 29 U.S.C. § 160(c), Appendix B, infra, p. 20). Section 10(c) requires Board decisions to set forth "the reasons for believing this evidence and disbelieving that, for acceding greater weight to this testimony than to that, for drawing this inference rather than that." (Conference Report 510, 80th Congress, pp. 53-54).

In addition, the Trial Examiner's decision must conform to the requirements of Section 8 of the Administrative Procedure Act. (60 Stat. 237, as amended; 5 U.S.C. § 1007, Appendix B, infra, p. 20; NLRB Rules and Regulations, Series 8, Section 102.35(i)).

Section 8(b) of the Administrative Procedure Act requires such decisions to contain the "reasons or basis" for the findings and conclusions on "all the material issues of fact, law, or discretion presented on the record. . . ." No such reasons were given here by the Trial Examiner. Thus, he does not say that it was the witnesses' demeanor upon which he relied; he only says he "observed" them. *What* the Trial Examiner observed is the crucial missing element from his decision. The Board has frequently stated that the Trial Examiner must indicate how he reached his credibility rulings. See, e.g., *M. & S. Company,* 108 NLRB 1193; *Jackson Maintenance Corporation,* 126 NLRB 115; *Allied Chain Link Fence Co.,* 126 NLRB 608, 610. Because the Board's 8(a)(1) finding rested on improper credibility rulings, it should be overturned by this Court.

Conclusion

Wherefore, it is respectfully submitted that for the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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Appendix A

DECREE

Decree of United States Court of Appeals for the First Circuit, April 7, 1965.

This cause came on to be heard upon petition for enforcement of an order of the National Labor Relations Board, and was argued by counsel.

Upon consideration whereof it is now here ordered, adjudged and decreed as follows: The order of the National Labor Relations Board of August 28, 1964, is hereby affirmed and enforced.

By the Court:
(s) ROGER A. STINCHFIELD,
Clerk

Appendix B

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372; 49 Stat. 449; U.S. Code, Supp. IV, Title 29, sec. 151 et seq.) are as follows:

"Sec. 7.

"Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

"Sec. 8.

"(a) It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

"(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

"Sec. 9.

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: PROVIDED, That the Board shall not (1) decide that any unit is appropriate for such

purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

* * *

"Sec. 10.

"(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

"(e) * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *"

* * *

Administrative Procedure Act:

"Sec. 8.

"(b) * * * All decisions (including initially recommended or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record. * * *"

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 292

PRIMROSE SUPER MARKET OF SALEM, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The court of appeals did not file an opinion. The Board's Decision and Order (B.A. 1-25)[1] are reported at 148 NLRB No. 66.

JURISDICTION

The decree of the court of appeals was entered April 7, 1965 (Pet. 18). The petition for a writ of

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[1] "B.A." refers to the portions of the record printed as an appendix to the Board's brief filed in the court of appeals.

certiorari was filed on June 26, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner's Salem store constituted an appropriate bargaining unit.

2. Whether the Board adequately set forth its reasons for finding that petitioner interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pages 19-20 of the petition, and at p. 8, n. 7, *infra*.

STATEMENT

1. *The Board's unit determination.*—On August 9, 1963, following an organizational campaign, the Union [2] informed petitioner that it represented a majority of the employees at its Salem store (B.A. 42-43). On August 13, the Company refused to recognize the Union, contending that the Salem store was not an appropriate unit for bargaining (B.A. 9; 44). The Union filed a charge with the Board and a

[2] Local 1435, Retail Clerks, International Association, AFL-CIO.

complaint was issued alleging that petitioner had unlawfully refused to bargain.[3]

The evidence taken at the unfair labor practice hearing showed that Primrose Super Market of Salem, Massachusetts, is one of five discount supermarkets operated by George Karambelas and his brother Arthur (B.A. 9-11; 31-33, 82). Each supermarket is separately incorporated (B.A. 10, 13; 74-75). The other four stores are located at Peabody, 4 to 5 miles from the Salem store; Georgetown, 20 miles away; Newburyport, 26 miles away; and Haverhill, 28 miles away (B.A. 10; 70, 74-76). The general business policy of each store is determined by the central office in Haverhill. Meat, produce and grocery supervisors determine sales plans, buy all special sale items and supervise the overall operation of their respective departments in each of the five stores (B.A. 11-12; 76, 79, 93). They visit each store several times a week to check on the supply of merchandise and to determine whether orders and retail price changes have been made correctly (B.A. 11-12; 92-93). General Manager George Karambelas also visits each of the stores several times a week (B.A. 12). He makes the final decisions in regard to the number of employees in each store, transfers, promotions and wage increases (B.A. 12; 61).[4]

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[3] It is clear that the Union represented a majority of the employees at the Salem store when petitioner denied the Union's request for recognition (B.A. 27-28).

[4] There is no central warehouse to store merchandise for the five supermarkets (B.A. 15; 88). Most of the merchandise

Each supermarket is run by a store manager, who spends all of his time in the store assigned to him (B.A. 14; 77). Under his immediate supervision are an assistant store manager, heads of the produce, grocery and meat departments and numerous employees, such as cashiers, clerks and baggers (B.A. 14-15; 28, 35-36, 47, 59-60). The store manager handles "the day-to-day duties of the store" (B.A. 14; 76). It is his job to open the store, take money out of the safe, set up the cash registers and make cash deposits at the local bank (B.A. 14; 65, 89). He must insure that his department heads know and conform to their sales plans, have enough of the regular stock and advertised sale items, and display their merchandise correctly (B.A. 14; 66, 93, 95). When there is a shortage of normal (as distinguished from "special sale") items, the store manager may order them directly from suppliers (B.A. 16; 66, 79-80, 98). He ordinarily orders small amounts of produce directly, consulting with the produce supervisor if larger amounts are required (B.A. 16; 79-80).

The store manager sets up the weekly work schedules and determines the number of hours part-time employees are to work (B.A. 14; 60-61, 99). At the end of the week he is responsible for taking the time cards off the rack and figuring out the hours worked (B.A. 14; 90). The store manager determines when employees take rest periods and approves employee requests to leave work early (B.A. 14; 61, 64, 90-91).

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in the Salem store comes directly from suppliers (B.A. 15; 88-89).

He has authority effectively to determine whether layoffs are necessary and, if so, who should be laid off (B.A. 14; 61-62). He also has authority effectively to recommend that employees be hired, discharged, promoted, or transferred (B.A. 14-15; 64-65; 68, 84-86, 87, 97-98).

It is the general practice of all the stores to hire people residing in the city in which the store is located (B.A. 18; 81). Most of the employees of the Salem store are teenagers who live in Salem and work part-time after school (B.A. 17-18; 49, 70, 81, 99).[5] Each store has a separate seniority list and employees are laid off on the basis of their seniority within that particular store (B.A. 16; 62-63). Employees are paid by each supermarket for the work done in that market. If an employee works in two different stores during the same week, he receives two separate checks, representing the time spent in each store (B.A. 49, 53-54, 57).

There is little interchange of employees between the Salem store and the other four stores. During 1962 there were only 12 temporary transfers and 1 permanent transfer of employees into or out of the Salem store (Resp. Exh. No. 7). During 1963, there were 6 permanent transfers and approximately 51 temporary transfers involving the Salem store (Resp. Exh. No. 8). The increased interchange during 1963 was caused by the changeover of operations at all five stores from retail to discount operations (B.A.

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[5] A part-time employee is one who works less than 40 hours a week (B.A. 81).

17-18; 72), a process taking 2 or 3 days, during which time the store undergoing alterations was closed (B.A. 57, 108). The manager of the Salem store was asked by George Karambelas to see whether any Salem store employees would volunteer to work in another store to help convert it to a discount supermarket (B.A. 70-71). Part-time employees from one store were not sent to other stores unless they consented to go (B.A. 18-19; 49, 53, 57-58, 71).[6] In keeping with the Company's policy that employees work as close to their homes as possible (B.A. 109), most transfers of part-time employees involving the Salem store were between it and the Peabody supermarket (B.A. 17; 98, 109-110).

In view of the geographic separation of the Salem store, the substantial authority of the store manager, the minimal interchange of employees between that store and the other stores, and the fact that there was no bargaining history on a broader basis and no union was claiming representation on such basis (B.A. 19; 44), the Board found that the employees at the Salem store constituted an appropriate unit for collective bargaining purposes. Accordingly, the Board concluded that petitioner violated Sections 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the representative of those employees (B.A. 13-19).

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[6] A printing error appears at the top of page 71 of the Board's appendix. The answer to the first question on the page should read, "They didn't have to" (see Transcript of Testimony, p. 205).

2. *The Board's 8(a)(1) findings.*—The Board also concluded that, subsequent to the Union's demand for recognition, petitioner engaged in conduct, violative of Section 8(a)(1) of the Act, in an effort to dissipate the Union's majority status (B.A. 20-25). This conduct included soliciting the employees to withdraw from the Union (B.A. 4-8; 31, 34, 37, 38, 41, 48, 52, 55-56, 76, 77); threatening employees with less favorable working conditions, loss of income and discharge, if the Union came in (B.A. 4-6, 8; 29-30, 33, 36, 41, 46, 50); systematic interrogation of employees concerning their union activities and adherence (B.A. 4-8; 29-30, 36, 37, 41, 46-47, 48, 50, 51, 52, 54, 55, 56, 77); and creating the impression of surveillance of the employees' union activities (B.A. 4, 6-7; 29-30, 48-49, 56). These findings are based on the testimony of several employees which the Trial Examiner expressly credited. The only adverse witness was petitioner's store manager, whose denials were not credited (B.A. 7).

3. *The court's decision.*—The court of appeals enforced the Board's order without qualification (Pet. 18).

ARGUMENT

The decision of the court of appeals is correct. It is not in conflict with the decision of any other court, and there is no occasion for further review.

1. Petitioner concedes that, on the basis of the criteria used by the Board, a single store unit could be found appropriate for collective bargaining pur-

poses. It contends, however, that there was insufficient evidence to support the Board's application of those criteria here. (Pet. 11). Since this contention raises only an evidentiary issue which was resolved against petitioner by the court of appeals, it does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. In any event, it is clear from the facts summarized in the Statement (pp. 3-6, *supra*) that there is ample evidentiary support for the Board's unit finding here.

Petitioner's contention (Pet. 12, 15) that the Board violated Section 9(c)(5) of the Act is insubstantial.[7] That provision "was not intended to prohibit the Board from considering the extent of organization as one factor, though not the controlling factor, in its unit determination." *National Labor Relations Board* v. *Metropolitan Life Insurance Company*, 380 U.S. 438, 442. Here, the Board's unit determination was based upon several traditional criteria, clearly articulated in its decision, which, as we have noted, petitioner concedes were appropriate. That the Union may have tried unsuccessfully to organize the employees in some of petitioner's sister stores is not determinative. While this might show that the Union may have been motivated by the extent to which it had organized when it sought a unit confined to the Salem store, it does not establish that the Board was

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[7] Section 9(c)(5) provides that: "In determining whether a unit is appropriate for the purposes [of collective bargaining] the extent to which the employees have organized shall not be controlling."

so motivated in finding that unit to be appropriate. Nor does the fact that in 1960 the Union lost a consent election in a unit comprising all the Primrose stores militate against finding a single store unit appropriate at this time. Cf. *Purity Baking Co.*, 124 NLRB 159, 163; *Univac Division*, 137 NLRB 1232, 1233.

2. Similarly insubstantial is petitioner's contention (Pet. 15-16) that the Trial Examiner failed adequately to set forth the reasons for his Section 8(a)(1) findings. The Trial Examiner's report contains a detailed analysis of the evidence supporting his findings (B.A. 4-8) and the statement that his determinations as to credibility were based upon his "observation of the witnesses" (B.A. 3). These afford a sufficient basis for review. It is not necessary for the trier of fact to engage in a detailed discussion of the physical characteristics or demeanor which prompted his finding. *Paul M. O'Neill International Detective Agency* v. *National Labor Relations Board*, 280 F. 2d 936, 940 (C.A. 3). See also *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 529; *Trumbull Asphalt Co.* v. *National Labor Relations Board*, 314 F. 2d 382, 383 (C.A. 7), certiorari denied, 374 U.S. 808.

Contrary to petitioner (Pet. 16), Section 8(b) of the Administrative Procedure Act does not require Trial Examiners to give detailed reasons for deciding issues of credibility. It simply requires that, "Where oral testimony is conflicting or subject to doubt of its credibility, the credibility of witnesses would be a necessary finding if the facts are material." Administrative Procedure Act — Legislative

History, Sen. Doc. No. 248, 79th Cong., 2d Sess., 210-211, 273. Cf. *American President Lines, Ltd.* v. *National Labor Relations Board*, 340 F. 2d 490, 492 (C.A. 9); *National Labor Relations Board* v. *Witchita Television Corporation*, 277 F.2d 579, 585 (C.A. 10), certiorari denied, 364 U.S. 871. Here, the Trial Examiner made findings based upon his observation of the witnesses; nothing more is required.

CONCLUSION

The petition for a writ of certiorari should be denied.

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